STATE OF MICHIGAN

COURT OF APPEALS

TINA M. SPILSKI, f/k/a TINA M. NOVAK,

Plaintiff-Appellant,

v

BRIAN K. NOVAK,

Defendant-Appellee.

UNPUBLISHED
March 20, 2003

No. 243189
Macomb Circuit Court
LC No. 98-005457-DM

Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

In this child custody dispute, plaintiff-mother appeals as of right from an order changing the legal and physical custody of the parties' minor children from plaintiff to both parties jointly. We affirm.

I. Facts and Procedural History

The parties were married in 1993. They have two children, a girl and a boy. In 1998, plaintiff initiated divorce proceedings. In 1999, the trial court entered a consent judgment of divorce, awarding sole legal and physical custody of the two minor children to plaintiff, and reasonable visitation rights to defendant-father, who was serving in the U.S. Army.

Two years later, in September 2001, defendant filed a motion to change custody, alleging that plaintiff had voluntarily changed the physical custody of the minor children, who had been residing with him in Indiana since January 2001. Defendant alleged that plaintiff sought to reclaim the physical custody of their son only. Defendant contended that the children were moved to Indiana upon plaintiff's request, because she could no longer deal with the children's problems. Plaintiff, on the other hand, asserted that the children's move to Indiana was intended to be temporary.

In October 2001, the trial court entered an order awarding defendant temporary physical custody of the children. The evidentiary hearing for the permanent custody proceedings took place in July 2002. The trial court began the hearing by ruling that it found a change of circumstances in this case because the children were now residing in Indiana.

The undisputed evidence in this case indicated that, on January 19, 2001, the parties' ten-year-old daughter was hysterical and out of control as a result of one of her "emotional tirades" in a power struggle between her and plaintiff. The parties' daughter called defendant, asking him to take her and her five-year-old brother to his home because plaintiff wanted them to leave. In a later telephone call, plaintiff told defendant that the children were unhappy, and that they did not want to live with her. Defendant and his current wife arrived in Michigan from Indiana at 1:00 a.m., and removed the children from plaintiff's home. Their daughter was enrolled in school in Indiana, and their son was subsequently enrolled in preschool.

The children spent six weeks in the summer of 2001 with plaintiff, and then returned promptly to defendant to live in Indiana. In September 2001, plaintiff wanted their son to return to Michigan. Defendant refused, and he filed a motion to change custody.

The trial court ruled that the established custodial environment with plaintiff was extinguished after the children moved to Indiana, and that neither parent had an existing custodial environment. Therefore, the trial court applied the preponderance of the evidence test in determining whether custody should be changed. The trial court then analyzed the child custody factors, and determined that the parties were equal with regard to all factors. The trial court awarded joint legal and physical custody to the parties. The children were to reside with defendant during the school year, and with plaintiff during the summer.

II. Standard of Review

This Court, in *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000), summarized the standards of review that are applied in custody cases as follows:

> We apply three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [Citations omitted.]

III. Analysis

On appeal, plaintiff argues that the trial court erred in finding a change of circumstances that was necessary to re-visit the initial custody order, and that the trial court's finding that an established custodial environment no longer existed was legal error, while the court's findings with respect to seven of the child custody factors were against the great weight of the evidence. We disagree.

A. The Existence of a Change of Circumstances

MCL 722.27(1)(c) provides, with regard to custody decisions, that a trial court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances. . . ."

We conclude, from our review of the record, that the trial court properly found a change of circumstances in this case. The judgment of divorce, entered by the same court, had awarded sole legal and physical custody of the two minor children to plaintiff. Plaintiff does not deny that the children were living with defendant since January 19, 2001, and that their minor daughter and son were enrolled in school in Indiana. Thus, the children had been in the physical custody of defendant, contrary to the judgment of divorce and constituting circumstances different than those that existed at the time of the divorce, for about nine months prior to the date of defendant's motion for change of custody. Accordingly, the court properly concluded that a change in circumstances had occurred.

B. Established Custodial Environment

Plaintiff argues that that the trial court erred as a matter of law when it determined that the established custodial environment that existed with plaintiff was destroyed after January 19, 2001, due to the indefinite nature of the "temporary" move. Whether an established custodial environment exists is a question of fact, which the trial court must address before it determines the child's best interest. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). A custodial environment is established if

> over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

Plaintiff contends that Michigan's public policy protects a custodial parent when a temporary relinquishment of physical custody is made in the best interests of the child. Courts should strive to return custody to a parent who relinquished physical custody temporarily to protect the child's best interest. *Heltzel v Heltzel*, 248 Mich App 1, 33; 638 NW2d 123 (2001); *Straub v Straub*, 209 Mich App 77, 81; 530 NW2d 125 (1995). Plaintiff asserts that the trial court's ruling that the established custodial environment no longer existed with her was contrary to Michigan law.

In support of her argument, plaintiff relies on this Court's decisions in *Pluta v Pluta*, 165 Mich App 55; 418 NW2d 400 (1987), and *Speers v Speers*, 108 Mich App 543; 310 NW2d 455 (1981). However, we find that the facts in the instant case are distinguishable. In each of those cases, the temporary relinquishment of physical custody was pursuant to a specific and undisputed agreement between the parties that was fairly definite as to duration and the circumstances under which the temporary custody would end, or in other words that the

relinquishment was in fact temporary.[1] *Pluta, supra* at 57-58, 61; *Speers, supra* at 544; see also *Straub, supra* at 81 (all the parties agreed and understood that the new custodial arrangement was temporary). In the instant case, our review of the record supports the trial court's determination that there was nothing in evidence to support plaintiff's contention that her initial intent was to let the children stay with defendant until the end of the 2001 school year. On the contrary, she actually had the children for six weeks following the end of that school year, and then promptly returned them to their father. There was a lack of evidence indicating that the parties had any agreement that was fairly definite as to duration and the circumstances under which the temporary custody would end; plaintiff failed to sufficiently establish an agreement for temporary relinquishment of custody. Indeed, defendant has always maintained that the children were turned over to him on a permanent basis. To the extent that there was conflicting evidence on the subject, we shall not interfere with the trial court's superior ability to evaluate the evidence and assess the witnesses' credibility. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998). Minimally, the evidence did not clearly preponderate in favor of a finding that the established custodial environment was with plaintiff.

[paragraph deleted] From our review of the record, we conclude that the trial court properly examined the totality of the circumstances in this case, and did not err in concluding that the custodial environment with plaintiff no longer existed.

C. The Child Custody Factors

Finally, plaintiff argues that the trial court's findings with respect to seven of the twelve child custody factors, MCL 722.23, were contrary to the great weight of the evidence. Particularly, plaintiff challenges the findings on factors (a),(b),(d),(e),(h),(j), and (l).

Absent a showing of an established custodial environment, the trial court is free to award custody to either parent, on a showing of the preponderance of the evidence that the child's best interest calls for a change of custody. *Foskett v Foskett*, 247 Mich App 1, 6-7; 634 NW2d 363 (2001). In this case, the trial court found the parties equal on all factors. We find no error.

The factors that plaintiff challenges on appeal are set forth in MCL 722.23, and are as follows:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.

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[1] In *Pluta, supra* at 58, this Court stated that the plaintiff and the defendant "agreed that defendant was to care for the minor child until plaintiff returned to Michigan." In *Speers, supra* at 544, this Court stated:

> It was also agreed by the parties that the children would resume living with the plaintiff in Oregon at Christmas. However, the parties subsequently agreed that it would be in the children's best interests not to change schools during the school year and that the children would continue to reside with defendant until the end of the school year.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

* * *

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

* * *

(h) The home, school, and community record of the child.

* * *

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

* * *

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

With respect to factor (a), plaintiff asserts that, based on the fact that defendant was minimally involved with the children prior to January 2001, and she was the children's caregiver since their birth, it was highly improbable that the strength of the emotional ties the children had with each parent was equal. Here, the record support's plaintiff's assertion of defendant's minimal involvement with the children prior to the move. However, there is nothing to indicate the absence of emotional ties between defendant and the children. To the contrary, it was the parties' daughter who wanted to live with defendant. The record reflects that the children responded to, and loved, both parents equally, and that the parents equally loved and had strong emotional ties to their children. Therefore, we conclude that the trial court's ruling that both parties were equal under factor (a) was not erroneous.

With respect to factor (b), plaintiff asserts that defendant's short experience in raising the children and the children's sudden introduction into the Mormon religion in defendant's home, after the children were raised Catholic since their birth, could create confusion not manifested in their moral development. The record does not support this claim. At the hearing, defendant testified that he was Catholic, and that his Mormon wife and mother-in-law took the children to the Mormon church about four or five times. He denied that the children were otherwise involved with that church. Regardless, based on review of the testimony, it is doubtful whether plaintiff had seriously contemplated her children's religious upbringing. The evidence does not support plaintiff's claim that the children's exposure to Mormon church doctrine would create confusion not manifested in their moral development.

With respect to factor (d), plaintiff argues that the trial court failed to address the fact that plaintiff had provided a stable environment and a permanent family unit from the children's birth until the time of their temporary change in physical custody. This misstates the record. The trial court expressly concluded that the children had lived in a stable environment all their lives, both with plaintiff, and then with defendant.

With respect to factor (e), plaintiff asserts that a trial court is required to consider whether the family unit will remain intact, not whether which home was more acceptable than the other. Plaintiff argues that defendant did not have any family unit prior to his marriage to his present wife in 2001, and he had never assumed full responsibility for the children's care before the children moved in with him. The focus of factor (e) is the child's prospects for a stable family environment and whether the family unit will remain intact. *Ireland v Smith*, 451 Mich 457, 462, 465; 547 NW2d 686 (1996). Here, the trial court had expressly found the parties equal in all aspects, and it grounded its decision in this case on the twelfth factor – factor (l) – by noting that the change of custody occurred because plaintiff was distraught and could no longer deal effectively with the children. Such finding negates plaintiff's argument on factor (e), which focuses on whether the family unit will remain intact and provide a sense of stability to the child.

With respect to factor (h), plaintiff argues that the evidence of her daughter's consistent high level of academic performance, both before and after the move to Indiana, clearly showed that plaintiff's experience and success was far more extensive than that of defendant. Here, the trial court noted the child's consistent achievements at school regardless of who had custody, and also noted the discipline problems that plaintiff had with her daughter, concluding that plaintiff had allowed a young girl to control family situations. We conclude that the trial court's finding on this factor was not erroneous.

With respect to factor (j), plaintiff asserts that the dispute between the parties only arose immediately after defendant left the army and assumed the role of a full-time parent. She claims that defendant's testimony that the children did not want to see their mother should cast doubt on the sincerity of defendant's claim that he facilitated and encouraged the relationship between the children and plaintiff. Plaintiff argues that the trial court failed to address the fact that defendant did not to provide plaintiff with important medical, counseling and academic records.

In the context of custody cases, "[t]he trial court need not necessarily engage in elaborate or ornate discussion because brief, definite, and pertinent findings and conclusions regarding the contested matters are sufficient." *Foskett, supra* at 12. A review of the record shows that the trial court did not address the particular matters raised by plaintiff. Rather, the court commended the parties for their willingness and ability to facilitate and encourage close relationships with the children. The trial court particularly noted the sacrifices each party was making in commuting between Michigan and Indiana to ensure that the other parent could see the children. Moreover, plaintiff did testify that she received the academic records that she had requested, and plaintiff herself testified that her daughter did not want to stay with her. There was no error.

Finally, with respect to factor (l), plaintiff re-argues her claim that the trial court erroneously held that the indefiniteness of the temporary change in physical custody removed the instant case from the line of Michigan case law holding that a custodial parent should not be penalized for making a temporary change of custody in the best interests of the children. We

once again disagree for the reasons stated earlier in this opinion. Therefore, plaintiff's claim is without merit.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly